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First report on responsibility of international organizations

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I. Introduction

1. After the completion by the International Law Commission of its second reading of the draft articles on the responsibility of States for internationally wrongful acts, the General Assembly, in its resolution 56/82 of 12 December 2001, recommended that the Commission take up the subject of responsibility of international organizations.[1] During its fifty-fourth session (2002), the Commission decided to include the topic "Responsibility of international organizations" in its current programme of work.[2] The present writer was appointed Special Rapporteur and a Working Group was established.[3] The Working Group in its report[4] briefly considered the scope of the topic, the relations between the new project and the draft articles on State responsibility, questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[5]

2. The present report first surveys the previous work of the Commission relating to the responsibility of international organizations. It then discusses the scope of the work to be undertaken. Finally, it attempts to set out general principles concerning responsibility of international organizations, dealing with issues that correspond to those that were considered in chapter one ("General principles", articles 1 to 3) of the draft articles on the responsibility of States for internationally wrongful acts.[6]

II. Earlier work of the Commission on the topic

3. Responsibility of international organizations was identified in 1963 as a special question that deserved the attention of the Commission. This was in Mr. A. El-Erian's first report on relations between States and intergovernmental organizations. He also noted that "the continuous increase of the scope of activities of international organizations [was] likely to give new dimensions to the problem of responsibility of international organizations".[7]

4. In the same year, a Subcommittee on State Responsibility, which discussed the scope of the study that eventually led to the draft articles on the responsibility of

[1] The draft articles on responsibility of States for internationally wrongful acts are reproduced in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. IV.E.1, para. 76. The text of the articles with the related commentaries may be found ibid., chap. IV.E.2, para. 77.

[2] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. VIII.B, para. 461. Two years earlier, the Commission had included the topic in its long-term programme of work; ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. IX.A.1, para. 729. The Commission's report then included an illustration of the topic made by Mr. A. Pellet (ibid., annex, sect. 1, pp. 299-310).

[3] The Working Group was composed of Mr. G. Gaja (Chairman), Mr. J. C. Baena Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. M. Kamto, Mr. J. L. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. B. Simma, Mr. P. Tomka, Mr. C. Yamada and Mr. V. Kuznetsov (ex officio). *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. I.D, para. 10 (b).

[4] Ibid., chap. VIII.C, paras. 465-488.

[5] Ibid., chap. VIII.B, para. 464.

[6] Above, footnote 1, see chap. IV.E.1, para. 76.

[7] *Yearbook ... 1963*, vol. II, document A/CN.4/161 and Add.1, para. 172, p. 184.

States for internationally wrongful acts, concluded that "the question of the responsibility of other subjects of international law, such as international organizations, should be left aside".[8] Several members of the Subcommittee had expressed the view that consideration of the topic should be postponed.[9] The same view was then voiced by other members of the Commission in the plenary.[10] Thus, Mr. R. Ago, who had been appointed Special Rapporteur on State responsibility, could state in his first report on State responsibility that:

> "The Subcommittee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission."[11]

5. While issues relating to the responsibility of international organizations were not generally considered in the draft articles on State responsibility that the Commission adopted at first reading, two provisions concerning attribution of conduct referred to international organizations. One of them dealt with the case of an international organization placing one of its organs at the disposal of a State. Article 9 stated:

> "The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it was placed."[12]

When illustrating his proposal, contained in his third report,[13] for the text that eventually became the above-quoted article, the Special Rapporteur, Mr. R. Ago, also referred to the case of "acts of organs placed by States at the disposal of international organizations".[14] In the debate within the Commission on that text, several remarks addressed the question of who was responsible (a) in the case of an organ being placed by an international organization at a State's disposal and (b) in the reciprocal case of a State's organ being placed at an organization's

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[8] "Report by Mr. Roberto Ago, Chairman of the Subcommittee on State Responsibility, ibid., document A/CN.4/152, footnote 2, p. 228.

[9] See the interventions by Mr. de Luna (ibid., p. 229), Mr. Ago (pp. 229 and 234), Mr. Tunkin (p. 233) and Mr. Yasseen (p. 235). While practical considerations were given great weight, Mr. Ago also held that it was even questionable whether such organizations had the capacity to commit internationally wrongful acts (ibid., p. 229) and said that international organizations were too recent a phenomenon and the question of a possible international responsibility by reason of alleged wrongful acts committed by such organizations were not suited to codification (ibid., p. 234).

[10] The same view was later voiced in the interventions by Mr. Nagendra Singh (*Yearbook ... 1969*, vol. I, p. 108, para. 40) and Mr. Eustathiades (ibid., p. 115, para. 13).

[11] *Yearbook ... 1969*, vol. II, p. 140, para. 94.

[12] *Yearbook ... 1974*, vol. I, 1278th meeting, para. 39, p. 154.

[13] *Yearbook ... 1971*, vol. II (Part One), document A/CN.4/217/Add.2, para. 214, p. 274. The report included an analysis of issues relating to the military interventions in the Republic of Korea and the Congo (now Democratic Republic of the Congo), ibid., paras. 211 and 212, pp. 272-273.

[14] *Yearbook ... 1974*, vol. I, 1260th meeting, para. 39, p. 47.

disposal.[15] However, the draft article adopted at first reading and the related commentary only considered the question of attribution of conduct when an international organization lends one of its organs to a State.[16]

6. The reference to the lending by an international organization of one of its organs was dropped at second reading. Article 6 bears the title "Conduct of organs placed at the disposal of a State by another State" and only considers the case of a State lending one of its organs to another State.[17] However, the commentary acknowledged that "similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority".[18] The commentary further observed that this case "raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles".[19] A reference was then made by the commentary to the general saving clause which is contained in article 57 of the draft articles adopted on second reading. This clause will be considered below (para. 9). However, it is interesting to note at this stage that the commentary to article 57 includes the following passage:

> "Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State ... As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been 'placed at the disposal of' a State in the sense of article 6, and there is no need to provide expressly for the possibility."[20]

7. In the draft articles adopted on first reading, a reference to international organizations was also made in article 13. This considered one aspect of the issues of attribution of conduct arising in the relations between a State and an organization when an organ of that organization acted on the State's territory. Article 13 read:

> "The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction."[21]

In the discussion that preceded the adoption of this text, various issues relating to responsibility of international organizations were raised, especially those of the

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[15] See especially the interventions by Mr. Reuter (ibid., p. 47, para. 41, and p. 50, para. 18), Mr. Tabibi (ibid., p. 48, paras. 43-44), Mr. Elias (ibid., p. 48, para. 1), Mr. Yasseen (ibid., p. 49, para. 2), Mr. Ushakov (ibid., p. 49, para. 6, and p. 59, para. 44), Mr. Ago (ibid., pp. 49-50, paras. 10-11, and p. 60, para. 10), Mr. Tsuruoka (ibid., p. 52, para. 29), Mr. Bedjaoui (ibid., p. 52, para. 34), Mr. Calle y Calle (ibid., p. 53, paras. 39-41), Mr. Sette Câmara (ibid., p. 53, para. 45), Mr. Martínez Moreno (ibid., p. 56, para. 21), Mr. Quentin-Baxter (ibid., p. 57, paras. 28-30), Mr. El-Erian (ibid., p. 57, para. 33) and Mr. Bilge (ibid., p. 58, para. 36).

[16] *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, chap. III.B.2, pp. 286-290.

[17] Above, footnote 1, p. 95. The reference to international organizations was deleted in conformity with a proposal contained in Mr. James Crawford's first report on State responsibility, A/CN.4/490/Add. 5, para. 234.

[18] Above, footnote 1, para. (9) of the commentary to article 6, p. 98.

[19] Ibid. The commentary also mentioned "those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty. In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct". (ibid.)

[20] Above, footnote 1, para. (3) of the commentary, pp. 361-362.

[21] *Yearbook ... 1975*, vol. I, p. 216. The text had been originally adopted as article 12 bis.

legal personality of international organizations[22] and of the responsibility of States for the conduct of international organizations of which they are members.[23] The commentary to article 13 refrained from taking up a position on any of these issues:

> "... article 13 is not to be taken as defining the responsibility of international organizations or the problems of attribution which such responsibility presents. It merely affirms that the conduct of organs of an international organization acting in that capacity is not attributable to a State by reason only of the fact that such conduct has taken place in the territory of the State in question or in some other territory under its jurisdiction."[24]

No provision corresponding to article 13 appears in the draft articles adopted on second reading. Several provisions concerning attribution which were contained in the first-reading draft articles were deleted, particularly those which, like article 13, contained a negative, rather than a positive, criterion for attribution of conduct.[25]

8. The cases considered at first reading in articles 9 and 13 were far from dealing exhaustively with questions in which State responsibility appears to be related to responsibility of international organizations. However, the first-reading draft articles did not contain a general saving clause in order to exclude from their scope matters related to responsibility of international organizations. It is true that the title of the draft articles ("State responsibility") conveyed the idea that the text only dealt with cases in which the responsibility of a State was involved. Thus, one could have understood that the draft articles omitted consideration of whether an international organization was responsible in relation to the unlawful conduct of a State. However, no justification existed for silence about the reciprocal case of a State being responsible in relation to the unlawful conduct of an international organization. For instance, a State could conceivably be held responsible because it was a member of an international organization or because it aided, assisted or coerced an international organization when committing a wrongful act.[26] A saving clause would have been useful also for a further reason: there may well be cases in which a State is responsible towards an international organization, while Part Two ("Content, forms and degrees of international responsibility") and Part Three

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[22] See the interventions by Mr. Reuter (ibid., p. 45, para. 29), Mr. El-Erian (ibid., p. 46, para. 35), Mr. Ago (ibid., p. 52, para. 4, p. 59, para. 37, and p. 60, para. 42), Mr. Martínez Moreno (ibid., p. 53, para. 16), Mr. Tsuruoka (ibid., p. 55, para. 31), Mr. Ramangasoavina (ibid., p. 55, para. 34) and Mr. Calle y Calle (ibid., p. 57, para. 11).

[23] See the interventions by Mr. Ustor (ibid., p. 44, para. 44, and p. 66, para. 54), Mr. Ushakov (ibid., p. 47, para. 6), Mr. Kearney (ibid., p. 55, para. 29), Mr. Ramangasoavina (ibid., p. 55, para. 34), Mr. Bilge (ibid., p. 58, para. 19) and Mr. Ago (ibid., p. 59, para. 37).

[24] *Yearbook ... 1975*, vol. II, document A/10010/Rev.1, chap. II.B.2, para. (12) of the commentary to article 13, p. 90.

[25] As formulated by the Special Rapporteur, Mr. James Crawford, in his first report on State responsibility: "As a statement of the law of attribution, article 13 raises awkward *a contrario* issues without resolving them in any way." A/CN.4/490/Add.5, para. 262.

[26] Articles 27 and 28 of the draft articles adopted on 1st reading only dealt with aid, assistance or coercion by a State in the commission of a wrongful act by another State. *Yearbook ... 1978*, vol. II (Part Two), document A/33/10, chap. III.B.2, p. 99 and *Yearbook ... 1979*, vol. II (Part Two), p. 94. In his eighth report on State responsibility, the Special Rapporteur, Mr. Robert Ago, said:

> "Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered, because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future." (ibid. (Part One), document A/CN.4/318 and Add.1-4, para. 3, p. 5).

("Settlement of disputes") of the first-reading draft articles only concerned relations between States. Also in this regard, the absence of any reference to international organizations could not be viewed as implied by the title of the draft articles.

9. Article 57 of the draft articles adopted on second reading reads as follows:

> "These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization."[27]

This provision makes it clear that various issues relating to the responsibility of international organizations and, more generally, to their conduct are not considered in the draft articles. With regard to the case of a State being responsible towards an international organization, which is not covered by the saving clause included in article 57, article 33, paragraph 2, contains a further saving clause, concerning Part Two of the draft articles ("Content of the international responsibility of a State"). The latter provision, which certainly concerns also international organizations although it does not mention them explicitly, reads:

> "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[28]

10. The commentary to article 57 states that the provision refers to intergovernmental organizations possessing "separate legal personality under international law" and that such an organization "is responsible for its own acts, i.e., for acts which are carried out by the organization through its own organs or officials".[29] After referring to the case of a State organ which is put at an organization's disposal and to the converse case,[30] the commentary goes on to say that the draft articles do not consider "those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization".[31] The final paragraph of the commentary notes that "article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e., for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization."[32]

11. This brief survey shows that, in the long itinerary leading to the adoption of the draft articles on the responsibility of States for internationally wrongful acts, some of the most controversial issues relating to responsibility of international organizations had already been referred to. Moreover, certain issues had also given rise to discussion within the Commission. While the draft articles adopted on second reading have left all the specific questions open, the Commission's work on State responsibility cannot fail to affect the new study. It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to

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[27] Above, footnote 1, p. 360. The proposal for this provision was made by the Special Rapporteur, Mr. James Crawford, in his first report on State responsibility, A/CN.4/490/Add. 5, para. 262.

[28] Above, footnote 1, p. 233; the related commentary is on pp. 234-235.

[29] Ibid., para. (2) of the commentary, p. 361.

[30] See para. 6 above.

[31] Above, footnote 1, para. (4) of the commentary, p. 362.

[32] Ibid., para. (5), p. 363.

be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text.

III. Scope of the present study

12. The Vienna Convention on the Law of Treaties of 23 May 1969[33] expressly refers to international organizations in its article 5, which states that the Convention applies to "any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization". The presence of this reference to international organizations prompted the inclusion in article 2(1)(i) of the following definition for the purposes of the Convention:

> "'international organization' means an intergovernmental organization."

This concise definition was reproduced in article I(1)(1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975,[34] article 2(1)(n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978,[35] and article 2(1)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986.[36]

13. The definition of international organizations as "intergovernmental organizations" has always been given for the purposes of a particular Convention, but the fact that it has found acceptance in a variety of contexts may suggest that it could be used also with regard to issues of responsibility. It is to be noted that the Commission accepted the same definition in its commentary to article 57 of the draft articles on the responsibility of States for internationally wrongful acts.[37] However, in a study that is specifically devoted to the responsibility of international organizations, some further reflections are required. First, the definition significantly affects the scope of the draft articles to be written. Thus, it is necessary to consider whether it is entirely appropriate for the purposes of the present draft articles. Secondly, even if the definition is regarded as appropriate, the option of writing a less concise, and more precise, definition should also be considered.

14. The main difficulty in reaching a satisfactory definition of international organizations is related to the great variety that characterizes organizations that are currently considered to be "international". One aspect of this variety concerns their membership. The definition of international organizations as "intergovernmental" appears to give decisive importance to the fact that membership of the organizations

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[33] United Nations, *Treaty Series*, vol. 1155, p. 331.

[34] A/CONF.67/16.

[35] United Nations, *Treaty Series*, vol. 1946, p. 3.

[36] A/CONF.129/15.

[37] The Commission said that "in accordance with the articles prepared by the Commission on other topics, the expression 'international organization' means an 'intergovernmental organization'". Above, footnote 1, para. (2) of the commentary, p. 361.

is composed of States.[38] In contrast, an organization is regarded as non-governmental when it does not have States among its members. A related aspect is the nature of the organization's constituent instrument. Intergovernmental organizations are generally established by treaty, while non-governmental organizations are based on instruments that are not governed by international law. However, with respect to both membership and constituent instruments, some organizations do not fall clearly into one or the other category. Thus, some organizations have a mixed membership, including States and non-State entities.[39] Some other organizations, although they have only States as their members, have not been established by treaty, but apparently by a non-binding instrument of international law[40] or even by parallel acts pertaining to municipal laws.[41] In these cases, should one assume the existence of an implied agreement under international law, one would be justified in assimilating the resulting organizations to those established by treaty. However, there are also examples of organizations which were established by States only under an instrument governed by one or more municipal laws.[42]

15. When considering a definition of international organizations that is functional to the purposes of draft articles on responsibility of international organizations, one has to start from the premise that responsibility under international law may arise only for a subject of international law. Norms of international law cannot impose on an entity "primary" obligations or "secondary" obligations in case of a breach of one of the "primary" obligations unless that entity has legal personality under international law. Conversely, an entity has to be regarded as a subject of international law even if only a single obligation is imposed on it under international

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[38] Characterization of an organization as "governmental" refers to membership rather than to functions or the internal structure. A different view was expressed by H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd ed. (The Hague/London/Boston: Nijhoff, 1995), p. 40, who consider as "fundamental characteristics of intergovernmental organizations" that the "decision-making powers are in fact exercised by representatives of Governments" and that "in important matters, Governments cannot be bound against their will".

[39] For instance, the World Meteorological Organization (WMO). Article 3 (d)(e)(f) of the WMO Constitution entitles entities other than States, referred to as "territories" or "groups of territories", to become members. See P. J. G. Kapteyn, R. H. Lauwaars, P. H. Kooijmans, H. G. Schermers and M. van Leeuwen Boomkamp, *International Organization and Integration. Annotated Basic Documents of International Organizations and Arrangements*, Supplement to volumes I.A-I.B (The Hague/Boston/London: Nijhoff, 1997), suppl. I.B.1.7.a.

[40] One example is the World Tourism Organization. See D. R. Gilmour, "The World Tourism Organization: International Constitutional Law with a Difference", *Netherlands International Law Review*, vol. 18 (1971), pp. 275-298. Another example is the Organization for Security and Cooperation in Europe. See M. Sapiro, "Changing the CSCE into the OSCE: legal aspects of a political transformation", *A.J.I.L.*, vol. 89 (1995), pp. 631-637; T. Schweisfurth, "Die juristische Mutation der KSZE: eine internationale Organisation in statu nascendi", in: *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (Berlin/Heidelberg/New York: Springer, 1995), pp. 213-228; I. Seidl-Hohenveldern, "Internationale Organisationen aufgrund von soft law", ibid., pp. 229-239; J. Bortloff, *Die Organisation für Sicherheit und Zusammenarbeit in Europa: eine völkerrechtliche Bestandsaufnahme* (Berlin: Duncker & Humblot, 1996); C. Bertrand, "La nature juridique de l'Organisation pour la Sécurité et la Coopération en Europe (OSCE)", *Revue générale de droit international public*, vol. 102 (1998), pp. 365-406; F. Mariño Menendez, "La Organización para la Seguridad y Cooperación en Europa (O.S.C.E.)", in: M. Díez de Velasco (ed.), *Las Organizaciones Internacionales*, 11a ed. (Madrid: Tecnos, 1999), pp. 661-670.

[41] For instance, the Nordic Council before the Treaty of Cooperation of 23 March 1962 entered into force. The text of the Treaty, as amended by an agreement of 3 February 1971, is reproduced in A. J. Peaslee (ed.), *International Governmental Organizations*, 3rd. ed., part I (The Hague: Nijhoff, 1974), pp. 1135-1143.

[42] See I. Seidl-Hohenveldern and G. Loibl, *Das Recht der internationalen Organisationen, einschliesslich der supranationalen Gemeinschaften*, 7th ed. (Cologne: Heymanns, 2000), pp. 57-58.

law. Thus, should an obligation exist for an international organization under international law, the question of that organization's responsibility may arise. Logically, a study on responsibility of international organizations should consider all the organizations that are subjects of international law.

16. The question of the legal personality of international organizations has evolved considerably since 1949, when the International Court of Justice assessed the legal personality of the United Nations in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.[43] The Court then asserted the Organization's legal personality on the basis of some specific features that were not likely to be replicated in other organizations. The key passage of the advisory opinion runs as follows:

> "In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.
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> "Accordingly, the Court has come to the conclusion that the Organization is an international person."[44]

In order to show the evolution in this area of international law, it suffices to contrast the passage quoted above with the language that the Court used in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.[45] The Court in its opinion considered international organizations in general, although, it could be said, with implicit reference to an organization of the same type as the World Health Organization, and stated:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[46]

17. The Court's assertion of the legal personality of international organizations needs to be viewed in the context of its more recent approach to the question of legal personality in international law. The Court stated in the *LaGrand* case that individuals are also subjects of international law.[47] This approach may lead the Court to assert the legal personality even of non-governmental organizations. It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members.

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[43] *I.C.J. Reports 1949*, p. 174.

[44] Ibid., p. 179.

[45] *I.C.J. Reports 1980*, p. 73.

[46] Ibid., para. 37, pp. 89-90.

[47] *I.C.J. Reports 2001*, para. 77. The Court referred to the Vienna Convention on Consular Relations of 24 April 1963 and concluded that "article 36, paragraph 1, creates individual rights".

18. Some constituent instruments of international organizations contain a provision analogous to Article 104 of the Charter of the United Nations, which reads as follows:

> "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

This type of provision is not designed to confer legal personality under international law on the organization concerned. It is noteworthy that in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations* the Court did not draw from Article 104 of the Charter any argument in favour of the Organization's legal personality, but said that the question of the Organization's international personality "[was] not settled by the actual terms of the Charter".[48] The purpose of Article 104 of the Charter of the United Nations and of similar provisions is to impose on Member States an obligation to recognize the Organization's legal personality under their domestic law.[49] A similar obligation is generally imposed by a headquarters agreement on the State, whether it is a member of the organization or not, on whose territory the organization has its headquarters.[50] Legal personality under municipal law is then acquired directly on the basis of the constituent instrument or of the headquarters agreement or, if it is so required by the municipal law of the State concerned, on the basis of implementing legislation.[51] The domestic law of a State may also confer legal personality irrespective of the existence of any obligation to that effect for the State.[52] Legal personality under international law does not necessarily imply legal personality in domestic law. On the other hand, the absence of legal personality under domestic law does not affect its status under international law, and hence the possibility that the organization incurs international responsibility.

19. Even if a treaty provision were intended to confer international personality on a particular organization, the acquisition of legal personality would depend on the actual establishment of the organization. It is clear that an organization merely

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[48] *I.C.J. Reports 1949*, p. 178.

[49] This point has been clearly developed by I. Seidl-Hohenveldern and W. Rudolph in their commentary on Article 104 of the Charter in B. Simma (eds.), *The Charter of the United Nations. A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002), pp. 1302-1306.

[50] This view was upheld, for instance, by the Italian Court of Cassation in its judgement No. 149 of 18 March 1999, *Istituto Universitario Europeo v. Piette*, *Giustizia civile*, vol. 49 (1999), I, p. 1309, at p. 1313, where the Court found that "the provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States".

[51] The constitutional requirements for the conclusion of the treaty may also be relevant in this respect. For instance, the Belgian Court of Cassation, in its judgement of 12 March 2001 in *Ligue des Etats arabes v. T.*, found that "Belgian courts could not refuse to entertain a case because of jurisdictional immunity provided for in a treaty concluded by the King in the absence of Parliament's approval" (English translation by author). See *Pasicrisie belge*, vol. 188 (2001), p. 394, at p. 398.

[52] Once an international organization acquires legal personality in a member State, this may entail legal consequences in a non-member State. As Lord Templeman, giving the reasons for the majority in the House of Lords, said in *Arab Monetary Fund v. Hashim and others*, *All England Law Reports* (1991) I, p. 875, "when the AMF [Arab Monetary Fund] Agreement was registered in the UAE [United Arab Emirates] by means of Federal Decree No. 35, that registration conferred on the international organization legal personality and thus created a corporate body which the English courts can and should recognize". Article 2 of the Agreement in question stated: "The Fund shall have an independent juridical personality and shall have, in particular, the right to own, contract and litigate." (ibid., p. 873)

existing on paper cannot be considered a subject of international law. The entity further needs to have acquired a sufficient independence from its members so that it cannot be regarded as acting as an organ common to the members. When such an independent entity comes into being, one could speak of an "objective international personality", as the Court did in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.[53] The characterization of an organization as a subject of international law thus appears as a question of fact.[54] Although the view has been expressed that an organization's personality exists with regard to non-member States only if they have recognized it,[55] this assumption cannot be regarded as a logical necessity. Should a State conclude a headquarters agreement with an organization of which it is not a member, it is hard to imagine that by so doing the State bestows on the organization a legal personality that would not otherwise exist. The very conclusion of the headquarters agreement shows that the organization is already a subject of international law. It should be noted that the organization's legal personality does not necessarily imply that the organization is entitled to enjoy immunities from non-member States under general international law.[56] Nor can it be assumed that member States' responsibility for the conduct of an organization of which they are members is identical towards other members and towards non-members.

20. While it may be held that a large number of international organizations have a legal personality in international law, the great variety of existing international organizations would make it difficult to state general rules applying to all types of organization. It would be as if the Commission considered questions of international responsibility concerning States and individuals at the same time. It is clearly preferable only to address questions relating to a relatively homogeneous category of international organizations. If the present study is intended to be a sequel to the draft articles on the responsibility of States for internationally wrongful acts,[57] it is appropriate to limit the scope of this study to questions relating to organizations that

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[53] *I.C.J. Reports 1949*, p. 185.

[54] G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organizations and Tribunals", *B.Y.B.I.L.*, vol. 29 (1952), p. 1, at p. 4, noted that according to the Court "the international personality of the Organization was a question of *fact*" and that "the existence of international personality as an objective fact is ... capable of producing consequences outside the confines of the Organization". The term "objective fact" was used by Judge Krilov in his dissenting opinion (*I.C.J. Reports 1949*, p. 218). The view that international organizations have an objective international personality was strongly advocated by F. Seyersted, "Objective International Personality of Intergovernmental Organizations", *Nordisk Tidsskrift for International Ret*, vol. 34 (1964), p. 1; the inferences that the author drew from the organizations' personality are not relevant in the present context.

[55] Thus I. Seidl-Hohenveldern and G. Loibl, op. cit. (above, footnote 42), p. 52.

[56] The view that, in the absence of an agreement, a non-member State is not under an obligation to grant immunity to an international organization was held, for instance, by the Paris Court of Appeal in its judgement of 13 January 1993, *Communauté économique des Etats de l'Afrique de l'Ouest and others v. Bank of Credit and Commerce international*. See *Journal du droit international*, vol. 120 (1993), p. 353, at p. 357. The same opinion was expressed by the Supreme Court of Justice of Argentina in its judgement of 31 August 1999, *Duhalde v. Organización Panamericana de la Salud*. See www.oas.org. Some other decisions on this issue are examined by A. Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge University Press, 2000), pp. 152-157.

[57] Various delegations made statements in the Sixth Committee stressing this point. See the statements by China (A/C.6/57/SR.20, para. 34), the Czech Republic (A/C.6/57/SR.21, para. 54), Israel (ibid., para. 61), Poland (A/C.6/57/SR.22, para. 15), New Zealand (A/C.6/57/SR.23, para. 21), Italy (A/C.6/57/SR.24, para. 29), Myanmar (ibid., para. 62), Brazil (ibid., para. 65), Romania (A/C.6/57/SR.25, para. 22), Switzerland (ibid., para. 36) and Chile (A/C.6/57/SR.27, para. 13).

exercise certain functions, that are similar, and possibly identical, to those exercised by States. These functions, whether legislative, executive or judicial, may be called governmental.

21. This choice would imply first of all that the study should not encompass questions of responsibility of non-governmental organizations, because they do not generally exercise governmental functions[58] and moreover would not raise the key question of the responsibility of member States for the conduct of the organization. This delimitation of the scope of application of the future draft articles corresponds to the views expressed by a large number of delegations in the Sixth Committee in response to an invitation to comment addressed by the Commission.[59] It is true that some delegations incidentally expressed the view that the exclusion of non-governmental organizations from the scope of the study should be made at the initial stage,[60] thus suggesting that the Commission could later review the delimitation and possibly widen the object of its enquiry. If one followed this suggestion, the way would be left deliberately open to reconsider the decision initially taken on the basis of further reflections. However, if the Commission so acted, it would have to rewrite some of the draft articles that it might already have provisionally adopted, a task that reminds one of Penelope's tactics for deferring the choice of a new spouse. It thus seems preferable, at least on first reading, to settle from the outset the question relating to the scope of application of the draft articles. Should a relatively homogeneous category of organizations be selected, there is in any case little risk that the decision to leave other organizations aside would affect the results of the study.

22. When approaching the question of the definition of international organizations for the purposes of new draft articles, the weight of precedents cannot be ignored, although one should not follow precedents automatically. As was recalled above,[61] international organizations were succinctly defined as intergovernmental organizations in several codification conventions and also in the ILC commentary on article 57 of the draft articles on the responsibility of States for internationally wrongful acts. On the basis of the premise that the Commission would take the decision to leave non-governmental organizations aside, one might be tempted to reproduce in a draft article the same definition that has been adopted several times

[58] One may acknowledge the existence of some exceptions, like the International Committee of the Red Cross.

[59] Statements by China (A/C.6/57/SR.20, para. 34), Israel (A/C.6/57/SR.21, para. 61), Cyprus (A/C.6/57/SR.22, para. 12), New Zealand (A/C.6/57/SR.23, para. 21), the United Kingdom (ibid., para. 39), Russian Federation (ibid., para. 70), Austria (A/C.6/57/SR.24, para. 20), Italy (ibid., para. 26), Belarus (ibid., para. 56), Myanmar (ibid., para. 62), Brazil (ibid., para. 65), Romania (A/C.6/57/SR.25, para. 22), Switzerland (ibid., para. 36), Japan (ibid., para. 43), Jordan (ibid., para. 56), India (A/C.6/57/SR.26, para. 15), Nepal (ibid., para. 19), Greece (ibid., para. 32), Slovakia (ibid., para. 38), Venezuela (ibid., para. 52), Cuba (ibid., para. 64), the Republic of Korea (ibid., para. 71), Argentina (ibid., para. 79) and Chile (A/C.6/57/SR.27, para. 13).

[60] See the statements by Cyprus (A/C.6/57/SR.22, para. 12), New Zealand (A/C.6/57/SR.23, para. 21), the United Kingdom (ibid., para. 39), Belarus (A/C.6/57/SR.24, para. 56), Myanmar (ibid., para. 62), Switzerland (A/C.6/57/SR.25, para. 36), Japan (ibid., para. 43), Greece (A/C.6/57/SR.26, para. 32) and the Republic of Korea (ibid., para. 71).

[61] Para. 12 above.

in the past.[62] However, each codification convention did not fail to state that the definition was given only for the purposes of the convention concerned. If the meaning of this is taken at face value, it is necessary to enquire whether the traditional definition would also be appropriate when delimiting the scope of a study on responsibility of international organizations. It should be noted that most conventions deal with international organizations only marginally and therefore are not very meaningful precedents. The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character is not significant in this regard, because, after defining international organizations as "intergovernmental organizations", article 1 defined "international organizations of a universal character", to which the scope of the Convention was limited according to article 2.[63] No doubt the 1986 Vienna Convention[64] was concerned with international organizations in general and nevertheless still referred to intergovernmental organizations; however, that Convention implied a substantial restriction because it considered only those organizations possessing a treaty-making power. In its commentary on the corresponding draft article, the Commission noted that several Governments had favoured a different definition, but the Commission had decided to keep the traditional definition of international organizations as "intergovernmental organizations":

> "... because it [was] adequate for the purposes of the draft articles. Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it."[65]

Should one accept the same general definition in the present study, one would be confronted with the very large number of intergovernmental organizations for which obligations under international law exist: in view of the developments concerning the legal personality of international organizations under international law,[66] there is a much greater variety of organizations than those which the definition was intended to include when it was originally made. Thus it seems reasonable that the Commission should delimit the scope by drafting a definition that is more appropriate for the present study. This new definition would have to comprise a more homogeneous category of organizations. It would also provide greater precision,[67] given the fact that the traditional definition of international organizations as intergovernmental organizations does not go very far.

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[62] The delegations of Venezuela (A/C.6/57/SR.26, para. 52) and Argentina (ibid., para. 79) appeared to favour the reproduction of the definition of international organizations as intergovernmental organizations. However, their remarks were made in the context of arguing for the exclusion of non-governmental organizations and thus one cannot necessarily assume that the two delegations intended to oppose the inclusion of a more detailed definition.

[63] Article 1(1)(2) of that Convention states that "'international organization of a universal character' means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a worldwide scale". See footnote 34 above.

[64] Above, footnote 36.

[65] *Yearbook ... 1981*, vol. II (Part Two), document A/36/10, chap. III.B, para. (22) of the commentary to draft article 22, p. 124.

[66] Above, paras. 16-17.

[67] The suggestion that it would be worthwhile to consider the definition of the term "intergovernmental organizations" was made by the delegation of the Russian Federation (A/C.6/57/SR.23, para. 70).

23. The one element of the traditional definition of international organizations that should not be lost when attempting to write a definition that is functional to the purposes of the present study is their "intergovernmental" character. As was observed above,[68] this characterization appears to refer to membership: in other words, what matters is which entities ultimately control the running of the organization and may modify or terminate its activity. What is important is actual rather than original membership. In an intergovernmental organization States have a decisive role, whether or not the organs of the organization are composed of State delegates.

24. In a less succinct definition than the one generally used in codification conventions, it is possible to specify that an international organization does not need to have only States among its members. The presence of some non-State members does not necessarily alter the nature of the organization, nor the problems that arise in terms of the respective responsibility of the organization and its States members. In a definition for the purposes of the present study it could be useful to state that international organizations to which the draft articles apply may include other international organizations among their members.[69] This would convey from the outset that the discussion of the responsibility of an international organization also comprises questions relating to its membership of other organizations. However, since it is not strictly necessary to specify that among the non-State members of an international organization there may be other international organizations, it may appear preferable to draft a simpler definition.

25. In the literature current definitions of the term "international organization" often state that an organization may be characterized as such only if it was established by an agreement under international law.[70] Some examples have been given above of important organizations that do not meet this formal requirement, although in those cases one could assume the existence of an implicit, even if possibly subsequent, agreement.[71] What seems to be significant for our purposes is not so much the legal nature of the instrument that was adopted for establishing the organization, as the functions that the organization exercises. A reference to the governmental functions that the organization exercises is directly relevant, while the

[68] Above, para. 14.

[69] For instance, in November 1991, the Constitution of the Food and Agriculture Organization of the United Nations (FAO) was amended to allow the admission of regional economic integration organizations. The European Economic Community, as it was then called, was admitted a few days later. See S. Marchisio, "Lo *status* della CEE quale membro della FAO", *Rivista di diritto internazionale*, vol. 76 (1993), p. 321. The amended text of the FAO Constitution may be found in P. J. G. Kapteyn, R. H. Lauwaars, P. H. Kooijmans, H. G. Schermers and M. van Leeuwen Boomkamp (eds.), op. cit. (above, footnote 39), suppl. I.B.1.3.a.

[70] Thus H. G. Schermers and N. M. Blokker, op. cit. above, footnote 38, p. 29, define international organizations "as forms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law". Ph. Sands and P. Klein (eds.), *Bowett's Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2001), p. 16, state that an international organization "must be established by treaty". According to M. Rama Montaldo, "International Legal Personality and Implied Powers of International Organizations", *B.Y.B.I.L.*, vol. 44 (1970), p. 111 at pp. 154-155, international organizations "possess international personality when they fulfil certain objective preconditions: an international agreement creating an association of States endowed with at least one organ which expresses a will detached from that of the member States and possessing defined aims or purposes to be attained through the fulfilment of functions or powers". The requirement of a "conventional basis" was also stated in Mr. Abdullah El-Erian's first report on relations between States and intergovernmental organizations, *Yearbook ... 1963*, vol. II, p. 167, para. 60.

[71] Above, para. 14.

nature of the constituent instrument has only a descriptive value. Even if it is true that in most cases an agreement was concluded under international law for establishing the organization, it is not necessary to mention the existence of such an agreement in the definition. Should two States intend to cooperate between themselves by creating an organization for constructing and running an industrial plant, they may do so through a contract that is concluded under one of the municipal laws. They could also achieve the same purpose by concluding an agreement under international law. It is less likely that they would establish by contract an organization that is endowed with certain governmental functions, but there is no necessary link between the constituent instrument of an organization and its functions.

26. As was noted above,[72] in a study that is regarded as a sequel to that on the responsibility of States for internationally wrongful acts, what appears to be relevant is the fact that the organization exercises certain normative, executive or judicial functions that may briefly be indicated with the term "governmental".[73] In order to keep some homogeneity in the object of the Commission's enquiry, the study should concern an organization only insofar as it actually exercises one of these functions, not the organization in general. It is not essential that governmental functions are exercised at the international level. When this occurs, it is likely that the organization concerned will have acquired obligations under international law in relation to those functions, and the question of the existence of breaches may arise more frequently. However, obligations under international law certainly affect also the exercise of governmental functions at the internal level. It seems superfluous to state in a definition the requirement that the organization is the addressee of obligations under international law. Should an organization be so fortunate that it does not have any obligations under international law, the question of the international responsibility of that organization would probably never arise in practice, but this does not seem a sufficient reason for not considering the organization in the present study.

27. For an organization to be held as potentially responsible it should not only have legal personality and thus some obligations of its own under international law. What is required is also that in the exercise of the relevant functions the organization may be considered as a separate entity from its members and that thus the exercise of these functions may be attributed to the organization itself. If in exercising governmental functions the organization, which may otherwise be a separate entity, acts as an organ of one or more States, its conduct should be attributed to the State or States concerned, according to articles 4 or 5 of the draft articles on the responsibility of States for internationally wrongful acts.[74] Practice relating to cases in which an organization exercises functions as an organ of one or more States should be considered in the present study only insofar as it may be useful for illustrating by contrast those instances in which conduct may on the contrary be attributed to an organization.

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[72] Above, para. 20.

[73] The term "governmental" may be taken to include the function of monitoring the implementation of treaties, to which the delegation of Austria referred (A/C.6/57/SR.24, para. 20).

[74] Above, footnote 1, p. 84 and p. 92. Article 4 may be relevant because even if it refers to "the internal law of the State" for the purposes of identifying State organs, it does not consider this a necessary requirement. The text of article 5 refers to a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority". The ILC commentary does not mention international organizations in these contexts.

28. A tentative definition, along the lines hereto suggested, appears below, in paragraph 34. The definition figures in draft article 2 because it seems preferable to start the overall text with a general description of the scope of the draft articles and to specify in a subsequent provision what is intended by "international organization". The two provisions are in any case linked, because they both contribute to delimiting the scope of the draft articles. The order here proposed finds several precedents. Several codification conventions give a general indication of the scope before the provision on the "use of terms". Examples are provided by the Vienna Convention on the Law of Treaties of 23 May 1969,[75] the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978,[76] the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 8 April 1983,[77] the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986,[78] and the New York Convention on the Law of the Non-navigational Uses of International Watercourses of 21 May 1997.[79]

29. The provision on the scope of the draft articles should first of all make it clear that the present study is only concerned with responsibility under international law. Thus, issues of civil liability, which have been at the centre of recent litigation before municipal courts,[80] will be left aside. This is not intended to deny the interest of some judicial decisions on civil liability, because these decisions either incidentally address questions of international law or develop some arguments with regard to a municipal law that may be used by analogy.[81] However, the choice of leaving out questions of civil liability is not only dictated by the fact that the draft articles on the responsibility of States for internationally wrongful acts did not deal with questions of civil liability. A further reason is that to state rules on civil liability would almost entirely be an exercise in progressive development of international law. It is in any event doubtful whether the Commission would be the most appropriate body for studying these questions.

30. The scope of the present study should be delimited in order to make it clear that the aim of the draft articles is only to consider questions of international responsibility for wrongful acts. The Commission has currently undertaken to examine as a separate study the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)".[82] This topic raises several problems which could be analysed also in

[75] Above, footnote 33.

[76] Above, footnote 35.

[77] A/CONF.117/14.

[78] Above, footnote 36.

[79] General Assembly resolution 51/229, annex.

[80] Especially the litigation concerning the International Tin Council. One of the related cases, in which the liability of the European Economic Community was invoked, was brought before the Court of Justice of the European Communities. See *Maclaine Watson & Company Limited v. Council and Commission of the European Communities*, case C-241/87, which was removed from the register by an order of the Court of Justice, but not before the advocate general delivered a lengthy opinion. Court of Justice of the European Communities, *Reports* (1990), p. I-1825.

[81] This point had already been made by the Working Group in its report. *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. VIII.C.8, para. 487.

[82] Ibid., chap. VIII, paras. 430-457; the question of the international liability of international organizations was not touched upon in this part of the Commission's report.

relation to international organizations. For the purposes of defining the scope of the present topic, it is important to note that issues arising out of acts not prohibited in international law are heterogeneous with respect to those considered in the draft articles on the responsibility of States for internationally wrongful acts. Most delegations that responded in the Sixth Committee to a request by the Commission for comment clearly expressed their preference that the present study should consider only issues relating to the responsibility of international organizations for wrongful acts.[83] Thus, should the Commission intend to undertake a study of the international liability of international organizations for acts that are not prohibited by international law, it would be more logical to do so either in the context of the current study on international liability or in a future sequel to that study.

31. The solutions advocated in the two preceding paragraphs could be seen as implied in a text that was analogous to article 1 of the draft articles on the responsibility of States for internationally wrongful acts.[84] This type of provision would link international responsibility with the commission of an act that is wrongful under international law, and therefore make it clear that the scope of the study does not include either questions of civil liability or issues of international liability for acts not prohibited in international law.

32. Responsibility of an international organization under international law will generally be caused by the wrongful conduct of that organization. However, it is conceivable that an organization is responsible also when the conduct is performed by a State or another international organization. This may occur in circumstances such as those considered in articles 16 to 18 of the draft articles on the responsibility of States for internationally wrongful acts:[85] for instance, in the case of aid or assistance given for the commission of an internationally wrongful act by a State or another organization. Responsibility of an international organization may also arise because of the unlawful conduct of another organization of which the first organization is a member. All these questions should certainly come within the scope of the present study. The scope should thus not be limited to questions relating to the responsibility of an international organization for conduct that may be regarded as its own.

33. The scope of the present study needs also to comprise matters that concern the responsibility of States, but were left out in the draft articles on responsibility of States because they are related to the wrongful conduct of an international organization. As was recalled above,[86] article 57 of those draft articles expressly left aside "any question of the responsibility under international law of an international organization" and also of "any State for the conduct of an international organization". The latter case concerns conduct which, unlike that of international

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[83] See the interventions by the delegations of Israel (A/C.6/57/SR.21, para. 61), Cyprus (A/C.6/57/SR.22, para. 12), Poland (ibid., para. 15), New Zealand (A/C.6/57/SR.23, para. 21), the United Kingdom (ibid., para. 39), Italy (A/C.6/57/SR.24, para. 26), Switzerland (A/C.6/57/SR.25, para. 36), India (A/C.6/57/SR.26, para. 15), Greece (ibid., para. 32), Slovakia (ibid., para. 38), Venezuela (ibid., para. 53), Cuba (ibid., para. 64) and the Republic of Korea (ibid., para. 71). The delegation of Belarus (A/C.6/57/SR.24, para. 56) suggested that the Commission should study the liability of international organizations "alongside" their responsibility for internationally wrongful acts. The delegation of Jordan (A/C.6/57/SR.25, para. 56) held that the topic of responsibility of international organizations should not be limited to responsibility for internationally wrongful acts.

[84] Above, footnote 1, p. 63.

[85] See above, footnote 1, pp. 155-168, for the text of the relevant articles and the related commentary.

[86] Above, para. 9.

organizations acting as State organs,[87] is to be attributed to an organization. According to circumstances, the responsibility of a State may nevertheless arise either because it has contributed to the organization's unlawful act or else because it is a member of the organization. These questions concerning the responsibility of States need to be addressed in the present study. The text concerning the scope should therefore not be limited to questions relating to responsibility of international organizations. It is necessary to point out that the questions concerning the responsibility of States would be included within the scope of the study entirely without prejudice to the way in which these questions should be answered. Even if the present study were to conclude that States are never responsible for the conduct of the organizations of which they are members, the scope of the present draft articles would not be accurately stated unless it was made clear that it includes those questions that were left out of the draft articles on State responsibility because of their relation to issues concerning responsibility of international organizations.

34. In view of the foregoing remarks, the following texts are submitted for the consideration of the Commission:

"Article 1
"Scope of the present draft articles

"The present draft articles apply to the question of the international responsibility of an international organization for acts that are wrongful under international law. They also apply to the question of the international responsibility of a State for the conduct of an international organization.

"Article 2
"Use of term

"For the purposes of the present draft articles, the term 'international organization' refers to an organization which includes States among its members insofar it exercises in its own capacity certain governmental functions."

IV. General principles relating to responsibility of international organizations

35. Chapter I of Part One ("The internationally wrongful act of a State") of the draft articles on the responsibility of States for internationally wrongful acts is headed "General principles".[88] It states three such principles. The first two principles are easily transposable to international organizations and seem hardly questionable. Article 1 of the draft articles reads as follows:

> "Every internationally wrongful act of a State entails the international responsibility of that State."[89]

The meaning of responsibility is illustrated elsewhere in the draft articles, in Part Two ("Content of the international responsibility of a State").[90] There is no reason

[87] Above, para. 27.
[88] Above, footnote 1, pp. 63-80.
[89] Ibid., p. 63.
[90] Ibid., pp. 211-292.

for taking a different approach with regard to international organizations. It can certainly be said, as a general principle, that every internationally wrongful act on the part of an international organization entails the international responsibility of that organization. As an example one may refer to the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said:

> "... the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.
>
> "The United Nations may be required to bear responsibility for the damage arising from such acts."[91]

36. Article 2 of the draft articles on the responsibility of States specifies the meaning of an internationally wrongful act, stating its two basic elements: attribution of conduct to a State and characterization of that conduct as a breach of an international obligation. These two elements are then developed in chapters II and III. Article 2 reads as follows:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) Is attributable to the State under international law; and
>
> (b) Constitutes a breach of an international obligation of the State."[92]

Again, there is no reason for adopting a different approach with regard to international organizations. One could state a similar general principle by simply replacing the term "State" with the term "international organization".

37. The third general principle, which is stated in article 3 of the draft articles on the responsibility of States, reads as follows:

> "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[93]

As the Commission did not fail to note at the outset in its comment on this draft article, "Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned."[94] It is doubtful whether it is really necessary to restate this principle in the draft articles on responsibility of international organizations. It is in any case clear that an internationally wrongful act is so characterized under international law. Other systems of law could hardly affect such a characterization. Moreover, the reference to the "internal law" would be problematic when applied to international organizations, since at least their constituent instruments generally pertain to international law. Furthermore, while compliance with the internal rules of the organization may not exclude the existence of a breach on the part of the

[91] *I.C.J. Reports 1999*, para. 66, pp. 88-89.

[92] Above, footnote 1, p. 68.

[93] Ibid., p. 74.

[94] Ibid., para. (1) of the commentary to the article.

organization of one of its obligations under international law towards a non-member State, this cannot be said in similar terms with regard to States that are members of the organization. According to Article 103 of the Charter of the United Nations, the constituent instrument and possibly binding decisions taken on the basis of the Charter prevail,[95] but this is not a rule that can be generalized and applied to organizations other than the United Nations. Whether these questions need to be examined in the context of the present draft articles remains to be seen. They certainly cannot be satisfactorily addressed in a provision stating a general principle, the main purpose of which would in any event be only to stress the need to consider questions of international responsibility exclusively in relation to international law.

38. The two principles recalled in the preceding paragraphs do not cover the question of the responsibility which States may incur as members of an international organization. They also do not comprise the case in which an international organization is responsible as a member of another organization, because the relevant conduct would in that case be attributable to the latter organization and not to the former. Also the case in which a State is responsible because it aids, assists or coerces an international organization does not come under the two said principles. However, while these principles would not apply to all the issues that come within the scope of the draft articles, they do not affect the solution of the issues that are not covered by the said principles. Saying that an international organization is responsible for its own unlawful conduct does not imply that other entities may not also be held responsible for the same conduct. Thus there appears to be no harm in stating the two principles as suggested above.

39. In stating the two general principles, it is not necessary to reproduce in two separate provisions the contents of articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts. The main reason for stating the first principle in a separate article 1 appears to have been the wish to start the text with the solemn proclamation that a wrongful act entails international responsibility. As was said in the commentary to article 1, this is "the basic principle underlying the articles as a whole".[96] Since in the present draft articles the first provision concerns the scope, it is preferable to include both principles in one provision, given the fact that the second principle basically represents a specification of the first one. Thus, the following text is here suggested:

> **"Article 3**
> **"General principles**
>
> "1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
>
> "2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

[95] Reference may be made to what the Court said in its orders on provisional measures in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*. See *I.C.J. Reports 1992*, p. 15, para. 39, and p. 126, para. 42.

[96] Above, footnote 1, p. 63, para. (1) of the commentary to the article.

(a) Is attributed to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.